No. 6600

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUGET SOUND NAVIGATION COMPANY,
a corporation,

Appellant.

vs.

HANS NELSON,

Appellee.

UPON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

Brief of Appellant

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STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Northern Division, which was entered upon May 11th, 1931, by Honorable George M. Bourquin, Judge, in an action at law before the court sitting with a jury, in a cause instituted by the appellee to recover damages for loss of property and alleged personal injury.

This case has previously been before this court on appeal, cause No. 6099, decision reported 41 Fed. 2d 356, 1930 A.M.C. 1386.

Appellee sets forth two causes of action, one for the loss of property, consisting of a small power fish boat, including certain equipment and personal effects, and the second for alleged personal injuries claimed to have been sustained by appellee resulting from a collision between said fish boat and the steam ferry Olympic. The fish boat Magna was owned and being operated by the appellee at the time of the collision, appellee being the only person aboard the fish boat.

The steam ferry Olympic was owned and operated by the appellant as a common carrier for hire, its navigation being in control of its master, officers and crew, servants and employees of appellant.

The collision took place on the inland waters of Puget Sound, State of Washington, on the main channel course of vessels proceeding down sound to the north from Seattle, and at a distance several miles in a general northerly direction from West Point.

Appellant's vessel, the Olympic, was enroute from Seattle to Port Townsend, and having rounded West Point was proceeding down the main channel course

approximately NNW½W magnetic. The Magna was proceeding from the entrance to the Lake Washington Ship Canal, at Ballard, diagonally across the course of vessels bound down Sound on the main channel course, and was heading west northwest magnetic (see chart, defendant's exhibit 11 on which course of Olympic is shown as line CD and course of fish boat Magna shown as line AB.)

The collision occurred, according to the pilot house clock of the Olympic at 5:20 P.M., and according to the estimates of the appellee at about 5:00 P.M., on the 5th day of December, 1927, the bow of the Olympic striking the port quarter of the Magna, with the result that the Magna shortly thereafter filled and sank.

In his first cause of action, appellee sought recovery of damages in the amount of $4,836.20, for the loss of his vessel, and personal property thereon, and in his second cause of action, damages in the amount of $2,500.00 for personal injuries alleged to have been sustained and to have resulted from said collision, and the subsequent jumping overboard of the appellee. (Tr. p. 5-7.)

The jury returned a verdict for plaintiff in the amount of $2,250.00 on his first caust of action and in the amount of $250.00 on his second cause of action. (Tr. p. 21.)

The trial occurred on the 5th and 6th days of May, 1931, and on May 11th, 1931, judgment in appellee's favor upon the verdict of the jury was entered by the court. (Tr. p. 21.)

At the close of appellee's case, appellant moved for non-suit and directed verdict (Tr. p. 20 and 48), which motion was by the court denied over exception of appellant. (Tr. p. 50.)

At the close of all of the evidence appellant renewed its motion for a directed verdict. (Tr. p. 20 and 91.) This motion was by the court denied over exception of appellant. (Tr. p. 20 and 91.)

At the close of the evidence appellant filed certain requested instructions which will hereafter be more fully identified and discussed, but the court declined to submit these instructions to the jury.

The evidence may perhaps be considered as divided into two separate parts, as far as periods of time are concerned, using the actual occurrence of the collision as the dividing line, in view of the particular issues which are submitted on this appeal, for neither the appellee nor any witnesses who testified in his behalf saw the appellant's vessel until after the collision, and none of appellee's witnesses, other than himself, saw his own vessel until after the collision. Cer-

tain of the witnesses for the appellant saw the appellee's vessel just prior to the collision and also, of course, observed both vessels thereafter, and in discussing this case hereafter in the argument, this circumstance as to the evidence which was produced, becomes very material, as will subsequently appear.

Those of the facts which appear from the evidence without direct contradiction and which are material to this appeal are substantially the following:

THE FACTS

On December 5th, 1927, the appellee set out alone in his gas boat, the Magna, a vessel 33 feet in length, from the Ballard locks entrance to the Lake Washington Ship Canal, Seattle, Washington, for Suquamish on the opposite side of Puget Sound, after sunset, which occurred on said day at 4:17 o'clock P.M. (See Exhibit 9.)

Previous to the day in question, appellee's boat had been equipped with an after range light on top of a pole mast in the after part of the boat, but, prior to the day of the collision, this mast and light had been removed by the appellee and not replaced, and appellee was proceeding at the time of the collision admittedly without his after mast or any light on the after part of his boat. (Tr. p. 42-43.)

The appellee, with his boat, left the Standard Oil Dock inside the Government Locks on the day in question at 4:30 o'clock P.M., proceeded through the locks, being still inside the entrance of the canal at 4:40 o'clock, his vessel making about 5½ miles an hour.

The appellee testified that at 4:40 he got through the locks and the sun was just going down behind the mountains then. (Tr. p. 42.) He further testified that at the time, the wind was westerly, blowing a good breeze, and that there was a heavy sea, and that the tide was going up with the wind, making big swells (Tr. p. 41); that appellee set out upon the course of West Northwest; that the wind was coming from west northwest and that he was heading into the wind, but the swell was more northerly. (Tr. p. 45.)

The appellee further testified that after he left the locks, and that when he got out by the blinker at the entrance to the Canal, he put up the two side lights and the mast head light on his vessel; that the mast head light was a bright light in front of the pilot house, being an electric light on the bow on top of the pilot house showing forward; that the side lights were the usual green and red lights which were on the after end of the pilot house with a screen on each side; that in addition to said lights he had one light hanging two

inches inside the door of the pilot house, the door being on the starboard side of the pilot house, opening aft (Tr. p. 37); that the door of the pilot house was a solid door and that it was open at the time of the collision, and at all times thereafter; that the pilot house was on the forward part of the boat; that all of said lights were burning in the positions stated from about 4:40 onward until after the collision (Tr. p. 38); and that he never went outside of the wheel house after first leaving the Standard Oil Dock, until after the collision. (Tr. p. 44.)

Appellee testified that he had no warning of the collision and did not see the appellant's vessel until after the vessels came together, and that at all times prior to the collision he was inside the pilot house looking ahead and navigating his boat, and never looked astern to see what was coming from that direction.

The foregoing is all of the direct material evidence introduced on behalf of appellee until after the time of the collision, and, with the exception of certain evidence, the introduction of which by the court, is claimed as error in this appeal, and which will hereafter be discussed, was all of the evidence affecting

the question of negligence on the part of the appellee at the time appellee rested his direct case.

The evidence as to appellant's vessel by appelant's witnesses was as follows:

The steamer Olympic, a passenger and vehicle ferry, of considerable size, the appearance of which is shown in plaintiff's exhibits 1, 2 and 3, was enroute from Seattle to Port Townsend, having left Seattle at 4:31 or 4:32 o'clock in the afternoon; the Olympic had all of her lights on, both navigation lights and lights in her cabins, when leaving Seattle. The vessel was in charge of the first officer, Harry John Whaley, from Seattle to Four Mile Rock, and at Four Mile Rock the master took over the navigation and remained in the pilot house with the quartermaster, who was steering the vessel at all times thereafter. The Olympic passed abeam of West Point Light at 5:01 P.M., according to the pilot house clock. There was a strong northwest wind blowing, and the sea was rough; the tide was ebbing, running out against the wind, and there were quite a few white caps and spray upon the water. (Tr. p. 74.) After rounding West Point, the master of the Olympic was standing on the starboard side of the pilot house looking out through an open window ahead. About four miles northwest of West Point the master saw a dark object almost

directly ahead of his vessel, but was not able to make out what it was. He thought it was a drifting dolphin or something of that character, which did not seem to have any motion in the water. The Olympic was making 13.8 miles, or 12 knots per hour on her regular course, until this object was sighted between 100 and 200 feet ahead of the Olympic, at which time the engines of the Olympic were put full speed astern. The master saw no light on this object, which proved to be the appellee's boat, until after it was struck by the Olympic and swung around under the Olympic's port bow. The Olympic had been running 19 minutes on her course from West Point, and the collision occurred, according to the pilot house clock of the Olympic, at 5:20 P.M. The master could tell that the engines were reversed promptly from the resulting vibration to the ship, but its headway could not be checked in time to avoid the collision, but it was checked considerably. (Tr. p. 75-76.)

The quartermaster on the Olympic, William Seatter, was called as a witness on behalf of appellant and testified as to events up to the point of collision, and substantially corroborated the master of the Olympic up to that point. It then appeared that his testimony as to certain occurrences after the collision substantially differed from testimony which he had

given at the former trial, and it developed that he had suffered from epileptic fits since the first trial, which affected his memory. The appellant, being taken by surprise, was therefore obliged to impeach this witness (Tr. pp. 56-60), and his testimony was in effect repudiated for all purposes.

For four or five minutes prior to the collision, the lookout on the Olympic, who was stationed at the foot of the stairway or ladder leading from the main deck to the boat deck forward (see plaintiff's exhibits 1, 2 and 3), was securing some heavy curtains on the passenger cabin windows forward, which were used to screen cabin lights from showing forward, and which had blown loose in the wind. He was doing this work at the direction of the master, and did not see the appellee's vessel until after the collision. The foregoing facts are without direct contradiction and with the exception of the question of visibility, are all of the material facts bearing upon the actual occurrence of the collision itself.

As to the visibility, appellee admitted that the sun was setting behind the mountains at about 4:40 P. M. (Tr. p. 42.) Mr. Lawrence Fisher, government meteorologist of the Seattle Weather Bureau, testified that on the day of the collision the sun set below a water level horizon at 4:17 P. M.; that on that day under

ideal conditions, civil twilight would continue thereafter for a period of 35 minutes, or until 4:52 P. M. He defined civil twilight as that period after sunset during which ordinary outdoor occupations are regarded as possible under ideal or cloudless conditions of the sky and a water-level horizon. The master, mate and lookout of the appellant's vessel testified that, at 4:32, when that vessel left Seattle, it was getting dusk, the master and lookout testified that upon reaching West Point light it was dark, with clouds banking mountains on the western horizon, and that only the high lands were visible, the water being dark, and that the collision occurred one hour and three minutes after the time of scientific sunset.

The appellee testified that at the time of the collision he could see easily one half mile on the water; that upon coming out of the canal he saw a tug on his starboard hand, off to the northward about one half mile away.

All witnesses agree that the moon was not visible prior to the collision, but the meteorologist, Mr. Fisher, testified that the moon was in the eastern quarter of the sky at the time, there being a few cumulous clouds observed from the Seattle Station some miles to the south of the point of collision at about 20 minutes before five, and that his records did not show the

conditions of the sky nine or ten miles northwest of the city, though his records showed that the sun set behind a solid bank of clouds in the West and was obscured on setting; that the period of practical twilight is dependent on the clearness of the sky and that the sun setting behind clouds will advance the time of the end of civil twilight.

SUMMARY OF MATERIAL IMPORTANT FACTS

1. The appellant's vessel Olympic was showing all lights prescribed by law.

2. The Olympic's lookout was not looking ahead for four or five minutes prior to the collision.

3. No lights on the Magna were visible to those in charge of the navigation of the Olympic until after the Magna swung about, following the collision, and the Magna herself was not seen, except as a dark outline in the water, practically ahead and one or two hundred feet distant from the Olympic before the collision.

4. The collision occurred one hour and three minutes after the sun had set beneath an ideal or water level horizon but scientific observation has it first descending behind a solid bank of clouds and the Olympic Mountains on the western horizon.

5. After the dark outline of the Magna became visible, everything possible within the judgment of the master of the Olympic was done to avoid the collision.

6. The appellee had removed the mast and range light prescribed by law from his vessel, but claimed to have an electric light hung inside the doorway of his pilot house on the starboard side aft thereof, with the door open.

7. Appellee never went outside the pilot house to observe whether this light was visible from any portion of the stern of his vessel, and there is no testimony *that this light was visible* to a vessel approaching from the port quarter, as was the Olympic, or from any other point *until after the collision.*

ARGUMENT

It is regrettable that appellant has been obliged to assign so many specific errors, but an examination of these assignments (Tr., pp. 124 to 141), will disclose that they all bear vitally upon one principal point, with the exception of the 13th and 22nd, and that is upon the primary question of the negligence or contributory negligence of the appellee in bringing about the collision, barring any right of recovery. The 13th and 22nd bear upon the primary question of appellee's negligence, or contributory negligence effecting

his alleged personal injuries suffered *after* the collision in the water.

The appellee's vessel was 33 feet in length (Tr. p. 34). By law a motor vessel of this size, between sunset and sunrise, is required to carry a white range light in the after part of the vessel, showing all around the horizon. The Act of June 9th, 1910, U. S. C. A., Title 46, Section 511, provides in part as follows:

> "The words 'motor boat' where used in this chapter shall include every vessel propelled by machinery and not more than sixty-five feet in length except tugboats and towbats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer. * * * * * *."

Sec. 512 of the same title provides as follows:

> "Motor boats subject to the provisions of this chapter shall be divided into classes as follows:
>
> Class 1. Less than twenty-six feet in length.
>
> Class 2. *Twenty-six feet or over and less than forty feet in length.*
>
> Class 3. Forty feet or over and not more than sixty-five feet in length."

Sec. 513 of the same title provides as follows:

> "Every motor boat in all weathers from sunset to sunrise shall carry the following lights, and during such time no other lights which may be mistaken for those prescribed shall be exhibited. * * * * * * * *
>
> (b) Every motor boat of classes 2 and 3 shall carry the following lights:

First. A bright white light in the fore part of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side. * * * * * * * * *

Second. *A white light aft to show all around the horizon.*

Third. On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side." (Italics ours.)

Appellee had admittedly removed this light and the mast upon which it was placed, from his vessel, and had no light in the after part of his ship at all, the only lights which he carried being the white so-called mast head light, the red port light and the starboard green light which were on his wheel house, and which were properly screened so as not to be apparent to a vessel approaching from the quarter, as was the Olympic, and a light inside the pilot house, all of these lights being in the forward part of the boat.

The appellee was therefore guilty of negligence as a matter of law, for failure to carry the prescribed range light aft, *or any range light aft,* and this negligence was of such a character as to bar appellee from any recovery in this case, unless appellee proved that his failure to so carry a range light *could not have been* a contributing cause of the collision. As stated by Justice Rudkin in the former appeal, *Puget Sound Navigation Company vs. Nelson,* 41 Fed. 2d 356, 1930 A. M. C. 1386, which has now become the law in this case:

> "On the foregoing facts the jury would be warranted in finding that both vessels were at fault, the Olympic for failure to keep a proper lookout, and the Magna for failure to display a proper signal; and in admiralty the rule is well settled that a vessel committing a breach of statutory duty must not only show that probably her fault did not contribute to the disaster, but that it could not have done so. *Belden v. Chase,* 150 U. S. 674, 699, 14 S. Ctfl 264, 269, 37 L. Ed. 1218. And, while this action was tried in the common law side of the court, the rights and liabilities of the parties are measured by the admiralty law, and not by common-law standards. *Chelantis v. Luckenbach S. S. Co.,* 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171."

See also *The Pennsylvania,* 19 Wall. 125; *The Martello,* 153 U. S. 64; *The Britannia,* 153 U. S. 130.

The undisputed facts in this case are that no light whatsoever was visible on the Magna to anyone on

board the Olympic prior to the collision, that the master of the Olympic saw the Magna as a dark outline after the vessels got into the jaws of collision but saw no sign of any light. There is likewise no testimony in this case that any light was visible on the Magna prior to the collision, from any point outside of the wheel house of the Magna, when viewed from the after part of that vessel. It is the efforts which the appellee made to fill in this fatal gap and deficiency in his case by improper testimony, which we will hereinafter point out, which makes pertinent and necessary the first, second, third, fourth, fifth and sixth assignments of error. And, no evidence being in this case which would possibly justify anyone, finding that this statutory breach of duty by the appellee could not have contributed to the collision, made necessary the granting of a directed verdict at the close of appellee's case, and this forms the basis of appellant's assignment of errors number seven and twenty-five. The action of the trial court in repeatedly instructing the jury contrary to the foregoing law, upon such evidence, and mis-stating the evidence itself, has made pertinent and necessary appellant's assignment of errors IX, X, XI, XII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXIII and XXIV.

The case is thus reduced down to an elementary basis for argument in this form, viz: there being no proper evidence in the case from which the jury could possibly be warranted in finding that the failure of the appellee to carry a visible white light in the after part of his boat as a range light, could not have contributed to the collision, the court committed errors in ruling upon evidence which the appellee put forward in an effort to fill in this deficiency of his case, being rulings covered by assignments of error I, II, III, IV, V and VI, and these errors seem to us logically grouped and discussed as one specification of error.

Next, upon the competent and proper evidence in the case, the court committed error in failing to hold appellee guilty of negligence barring recovery as a matter of law, by reason of his admitted failure to carry any visible light in the after part of his vessel, as required by law, and in thereupon denying appellant's motion for directed verdict at the close of appellee's case, assignment of error number VII, and the renewal of this motion, assignment of error number VIII, which we believe to be properly combined as a second general specification of error.

Next, upon the proper evidence in the case, and the law of this case as laid down by this court upon

the former appeal, the court erred in refusing to give the specific instructions requested by appellant, covered by assignments of error IX, X, XI, XII and XIII, and these errors, we believe, are properly grouped for discussion and argument under a third general specification of error.

Next, the court erred in a series of erroneous instructions which were repeated and intermingled, repeatedly instructing the jury as a matter of law that the appellee's light, which he claimed to have had within the wheel house, was a sufficient and proper light as a substitute for an after range light, and that the only question to be decided by the jury was whether or not such light was there and lit before the collision, which was in effect a directed verdict in favor of appellee, for no other person than appellee was in a position to have any knowledge as to whether such light was where it was claimed to be. In fact, no other witness testified concerning the same, and hence appellee's testimony that he had such a light was wholly undisputed, though the testimony of the case was, without contradiction, that no such light was visible to anyone other than appellee within his own wheelhouse. We believe that this series of related erroneous instructions should properly be grouped under a fifth specification of error, covering assign-

ments of error numbers XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII and XXIII.

The court made another separate and distinct error in instructing the jury with respect to the question of positive and negative evidence, which was not supported by the facts of this case, being assignment of error number XXIV, and this assignment forms a basis of a sixth specification of error.

Assignment of error number XXV, relating to the entry of judgment in favor of the appellee, goes to the whole case, and will, of course, be covered by the beforementioned specifications of error.

SPECIFICATIONS OF ERROR

Specification Number I: The court erred in admitting in evidence and submitting to the jury the testimony of Emil Schuman, witness for appellee, as to the visibility of the light in the cabin or pilot house after the collision, as testimony bearing upon the collision itself. (Assignment of error number I, Tr. p. 124.)

Specification Number II: The court erred in admitting and submitting to the jury testimony of appellee as to the visibility of other lights in his pilot house at times prior to the day of the collision, and his speculation upon the visibility of the light in the

pilot house at the time of the collision. (Assignments of error numbers II, III, IV, V and VI, Tr. pp. 124-125.)

SPECIFICATION NUMBER III: The court erred in denying appellant's motion for directed verdict at the close of appellee's case (assignment of error number VII, Tr. p. 126), and in denying appellant's motion for directed verdict at the close of all of the evidence. (Assignment of error number VIII, Tr. p. 127.)

SPECIFICATION NUMBER IV: The court erred in refusing to give the specific instructions to the jury requested by appellant, and covered by written requested instructions. (Assignments of error, numbers IX, X, XI, XII and XIII, Tr. pp. 127-132.)

SPECIFICATION NUMBER V: The court erred in giving the specific instructions covered by assignments of error numbers XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII and XXIII, being the following:

> "As a matter of fact, the court agrees with the statement of counsel for the defense in his argument that if the plaintiff had that light in the doorway of his boat, lit long enough before the collision so that it could have been seen by a proper lookout on the 'Olympic,' they would have avoided him, and the collision would have never occurred. And if the plaintiff had it there, as he says that he did, and which the defendant denies,

there is no reason why he should not recover in this action.

"Before we come to any more of the law, I am simply stating that I agree with counsel's position, and I think the plaintiff does now, too. That is all I can see in this case. You must remember this, that the plaintiff must prove his case by a greater weight of the evidence. The burden is on him throughout to prove that he had that light there, lit there for the length of time that I have stated to you, and prove that it was a good and sufficient light to serve its purpose, and to prove the amount of his damages. The burden is on him to prove all those things before he can recover. So you see that in this case, there [116] is mainly involved the credibility of witnesses where there is a direct conflict between the witnesses for the plaintiff and the witnesses for the defendant."

"The plaintiff basis his right to recover in this action on the fact that the collision was due, as he alleges, to the negligence and fault of the defendant, and the defendant alone, and the defendant resists on the theory, as it alleges, that it was not negligent and at fault at all, but that the plaintiff himself is the guilty person, by reason of not conforming to the rules with respect to his lights."

"The Captain was there, and his duty was to navigate the vessel and see that it was kept on its course, as he outlined it, but he is not a satisfactory lookout to come within the provisions of the law requiring a lookout to be kept, as I have defined it to you. And, again, that is the attitude of counsel for the plaintiff, when he says there is only one question in this case, and I agree with

him, whether the aft light on this vessel of the fisherman was there."

"Now, you have heard the testimony of the plaintiff. He told you * * * he was in there navigating his vessel north, northwest, the same course as the defendant's vessel was going when it overtook him."

"The plaintiff was not obliged to keep any lookout behind him, because if he had his lights lit, he was entitled to presume that any vessel following him would take note of him and would comply with the law and not run him down."

"On the other hand, there are two witnesses for the plaintiff who testified to seeing the light shortly after the collision occurred. Mrs. Schuman, now deceased, whose testimony was read to you, testified that she was eating when she felt the vibration of the reversing; that she sat still for quite a while, and hearing more commotion, she went to the window and saw a boat and saw a light on top of the vessel. She does not say whether that was a light in the cabin door, or at the bow of the vessel. She said she saw it on top of the vessel. That was her testimony, and Mr. Schuman testified that he came out some time after the collision—you remember the time—of course the intervals, perhaps, were not very long, any of them—and that after the 'Olympic' had backed so that it was in the rear of plaintiff's boat, he saw this white light burning in the cabin door."

"If that was his aft light, and there is no reason why it could not have been, even though it was not across the dividing line in the middle of the ship—between the bow and the stern—if that was his aft light, and it was the only aft

light that he had, if it was not so placed that it would be seen all around the horizon, it could be seen from behind, but it could not be seen from either side, because it was within the frame two inches, and, of course, it could not be seen from the front. But you must remember, too, that the law is a practical thing, and it does not require any useless thing. If that light served the purpose of an aft light to a following vessel, it was altogether immaterial whether it would show from the sides or show from ahead, so far as that vessel is concerned, but provided it was sufficient to serve the purpose of an aft light for the following vessel, and could not at all have misled it or have contributed to the collision which happened. I myself cannot reason out, and I think counsel has taken that attitude—I cannot reason out why, if that light was there, lit, and no obstruction in plaintiff's rear, and plaintiff testifies that there was none—I cannot understand why it would not serve just as well for the following vessel as if it could be seen from either side and ahead. If you can, why that is your privilege, for you to finally determine this. So it comes right down to that question—the attitude taken by the plaintiff's counsel in his argument, and the court takes it as a matter of law."

"You have two questions to decide in this case, outside of the damage, and you must decide them both in the affirmative before you can find for the plaintiff. First, it is proven by the greater weight of the evidence that Nelson's light in [118] his cabin door was where he testified that it was; that it was of the kind that he testified it was, and lit sufficiently long before the collision so that it could have been seen by the defendant's lookout, had he been exercising his function prop-

erly and in time so that the collision might have been avoided. If you answer that that is proven by the greater weight of the evidence, then you proceed to the next question. If you do not find that the greater weight of the evidence proves that in Nelson's favor, that ends the case. Of course, if he did not have that light lit, and lit sufficiently long so that a watchful lookout on the defendant's vessel could have seen it in time to avoid him, why he has no right to any recovery here, because he was negligent. In that case, he violated the law, and I do not care whether it was five o'clock or five-twenty, or whether it was more or less dark, it is inevitable that the absence of his light, if it was absent, would have contributed something to the collision that followed. He is out of the case and out of court right there, unless you find by the greater weight of the evidence that his light was there, as he tells you, with that degree of sufficiency—a 6-volt light—and lit long enough to have been seen and avoided by the defendant's vessel, had it a watchful lookout at the time.

If, however, you find that in favor of the plaintiff, then the next question is, in its position there in the door, if you find it was there and lit—not visible ahead and not visible on the sides—did it have anything to do with or is it clear to you that it contributed nothing to the collision that followed. Here is a vessel coming from behind—the defendant's vessel. If that light had been visible on the sides and ahead, would it have better enabled the defendant's vessel aft to avoid him and to see him and avoid him? I do not think so, and counsel's attitude for the plaintiff in his argument likewise was the same. That is common sense. If the light was there, and visible from the defendant's vessel, had it a watchful lookout, as

counsel said fairly in his argument, if it was there long enough, it would have enabled the defendant to avoid the collision.

"So, if you answer those two questions in the affirmative, proven by the greater weight of the evidence, favorable to the plaintiff, then there is only one more question, and that is, how much was the damage?"

"But if you find that he has been injured by the fault of the defendant as I have heretofore defined it to you—if you answer the two questions that I first put to you in favor of the plaintiff, then he is at least entitled to something for having his personal rights invaded by being thrown into the water."

"That is the case before you. It simmers down to this, Lady and Gentlemen of the Jury, that taking into consideration all of the evidence in the case, both for the plaintiff and the defendant, and the circumstances, if you find by the greater weight of the evidence that the plaintiff had, as he testified to you, a light in the door of his pilothouse, facing the rear, of 6-volt size, as he tells you, and burning long enough before the collision so that a watchful lookout on defendant's vessel could have seen it, and so could have avoided the collision, he is entitled to recover."

Specification Number VI: The court erred in instructing the jury as follows:

"Now, the law says that where two persons testify to a situation at the same time, the one who testifies positively that it was thus and so—'I saw it'—is entitled to more weight than one who says, 'No, it was not that way.' 'I didn't see it.'

"That is the point that counsel wants to make, and it is for you to say whether it applies in this case. The plaintiff says, 'I had the light there,' and the captain says. 'He did not have the light there, because I did not see it.' Of course, that involves whether he saw it or he did not see it because it was not there." (Assignment of error number XXIV, Tr. p. 141.)

ARGUMENT ON SPECIFICATION NUMBER I

The witness Emil Schuman, saw nothing of the appellee's boat and admittedly made no effort to do so, until after the collision, when the appellant's vessel had backed up into proximity with it, and when both vessels were swinging about in varying positions, and his testimony as to the visibility of a light in the wheel house of the appellee's boat at such a time could not possibly have any relavency or materiality in this case, and should not have been submitted to the jury, as being any proof as to the visibility or lack of visibility of any light upon the appellee's vessel, prior to the collision, when they are upon different and fixed courses, and had a definite and fixed bearing, one from the other. This testimony was, however, submitted to the jury as evidence of the fact that the light which appellee claimed to have had in his pilot house was visible prior to the collision, as note particularly the court's instruction under assignment of error number XIX (Tr. p. 136), which will hereafter be discussed.

This was unquestionably clear and prejudicial error, since this testimony was submitted in an effort to prove that appellee's failure to carry a range light aft on his vessel could not have been one of the causes of the collision.

ARGUMENT ON SPECIFICATION NUMBER II.

It was equally clear and equally prejudicial error for the court to permit the appellee himself to answer the following question in the affirmative: "Could anybody see that light suspended in the door of your vessel—in that open door approaching from the stern?" The admission of such testimony is pure speculation and guess work, since appellee admitted that he was never outside of his wheel house after lighting his lights and suspending the light mentioned inside his pilot house door. As appears from the transcript he stated: "I never went outside of the wheelhouse after I left Ballard. After the collision I went out, but up to that time I had been inside navigating the vessel. I did not have time to look astern of the ship to see what was coming in that direction. I never looked at all. I don't have to look back. I was looking to the windward; that was the only way I had to look." (Tr. p. 44.)

There was, therefore, no excuse or justification whatsoever for permitting the witness to testify and submitting to the jury the appellee's guess that anybody could have seen the light suspended in the door of his vessel, approaching from the stern, and even less for submitting this to the jury as evidence that such a light could have been seen by anyone approaching on the port quarter of the appellee's boat, and this was clearly improper and prejudicial, being submitted in an effort to prove that appellee's failure to carry any after light could not have been a cause of the collision.

The court committed error of the same character in permitting the appellee to answer the following questions, which all stand upon the same footing:

> "Hans, did you ever have occasion to be away from your own vessel at night-time, either on the shore or on another vessel, when you could see that light suspended in the doorway of your cabin?" (Assignment of error number III, Tr. p. 125.)
>
> "How far could you see that light when the light was on and when it was hanging in the doorway, suspended as it was at the time of the collision?" (Assignment of error, No. IV, Tr. p. 125.)
>
> "Have you actually seen that light half a mile away?" (Assignment of error Number V, Tr. p. 125.)

"How far could you see any vessel ahead of you, a vessel the size of the Magna?" (Assignment of error number VI, Tr. p. 126.)

The appellee answer the first two questions "Yes," the third question, "half a mile away," the fourth question "Yes, I have been on shore many times, and I have had that light burning and I have seen it. I seen that light on my own boat" (Tr. p. 39), and the last question the witness answered: "You could see a vessel like the Magna a quarter of a mile away, easily, at the time of that collision." (Tr. p. 41.)

The foregoing is all of the evidence offered or submitted upon the entire case tending in any way to establish that the failure of the appellee to carry a visible light aft in his vessel as required by statute, could not be one of the direct contributing causes of the collision, and all of this evidence was clearly improper in every sense of the word, leaving this case with no testimony or evidence which anyone was entitled to consider proving, or in any manner tending to prove that the failure of the appellee to carry such a light could not be one of the contributing causes of the collision, since the positive testimony of the appellant's master, Van Bogaert, was that he was looking directly ahead for 19 minutes prior to the collision, and that no light was visible upon the appellee's boat

at any time prior to the collision, nor was the boat itself visible as an unidentifiable object, until the collision was unavoidable.

ARGUMENT ON SPECFICATION NUMBER III.

This is an action at law before a jury, and contributory negligence on the part of the appellee is sufficient to constitute a complete bar to any recovery in this case.

As stated by Judge Rudkin of this court upon the former appeal (supra):

> "The appellee contends further that contributory fault or negligence on the part of a plaintiff is no bar to a recovery in an action of this kind. The settled rule is otherwise. In *Belden v. Chase, supra,* the court said:
>
> 'The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels, when both are in fault contributing to the collision, has long prevailed in England and this country. The *Max Morris,* 137 U. S. 1, 11 S. Ct. 29, 34 L. Ed. 586. But at common law the general rule is that, if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee v. Packet Co.,* 21 Wall, 389, 22 L. Ed. 619.
>
> 'In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if

it appeared that his own negligence directly contributed to the result complained of'."

This collision occurred on the 5th day of December, one hour and three minutes after the sun had set below the ocean level behind a bank of clouds and a mountain range.

The appellee claims it was not dark. Witnesses for the appellant testified that it was dark. The undisputed testimony of the meteorological expert was that under ideal conditions of sky and horizon, the end of civil twilight had occurred thirty minutes prior, and we submit that no reasonable mind could believe that there was not sufficient absence of natural light to make the absence of an artificial light on a vessel a contributing cause to a collision of this character. It is also admitted that no moon was visible at the time and the duty therefore devolved upon appellee to prove as a condition precedent to the avoidance of a directed verdict at the close of his case, that he *prove* that his failure to carry the light prescribed by law after sunset *could not have been one of the causes of the collision.* With the exception of the improper testimony discussed under the foregoing specification of error, there is not a scintilla or iota of evidence in the entire record touching this burden of proof.

Even after the admission of the above mentioned improper testimony, the testimony itself does not constitute any competent proof as to what was or was not visible to those on board the Olympic at any time prior to the collision, and lights which became visible after the vessels had changed their position and swung about in different directions is, of course, no evidence bearing upon the collision in any manner. We conclude, therefore, that it was the duty of the trial court to have granted appellant's motion for a directed verdict at the close of appellee's case, and that this duty became even more imperative, if such a thing were possible, at the close of all of the testimony, when there had been submitted the positive testimony of the master of the Olympic, as a result of his own continued observations through an open window, that no light was visible.

It was for the court as a matter of law to say whether the light which appellee claims he had in the wheelhouse, was sufficient to comply with the law, and unless proof had been produced from which a reasonable mind might conclude that this violation of the law by appellee could not have contributed to the collision, it was likewise the duty of the trial court to have directed a verdict for appellant, irrespective of

any fault upon the part of appellant, because of its lookout momentarily attending to the fastening of the curtains.

ARGUMENT ON SPECIFICATION NUMBER IV

Under the undisputed facts of this case, the instructions requested by the appellant were correct and proper, and under the law should have been given to the jury.

It will be noted that there is no dispute as to the course of the two vessels. The Magna was steering a course of West northwest (Tr. p. 45), whereas the course of the Olympic as appears from appellant's Exhibit 11, line CD was approximately north northwest, half west, so that 3½ points (or by matter of simple calculation, each point being 11 degrees and 15 minutes), 38 degrees, 22 minutes 30 seconds, or approximately 38½ degrees separated the course of these two vessels, and the Olympic was overtaking the Magna a little less than broad or 45 degrees on the Magna's port quarter, a position which put her out of range of all proper navigation lights of the Magna, except the after range light, if one had been carried, since neither the masthead light nor either of the colored sidelights is visible more than two points abaft the beam. (Title 46, U.S.C.A., section 513.)

The first portion of appellant's first requested instruction (assignment of error number IX, Tr. p. 128), was a statement of the law itself. The next to the last paragraph is a necessary conclusion of law drawn from such statute and the last paragraph of the requested instruction is simply a statement of the law as to contributory negligence, all of which this court on the prior appeal held to be a proper instruction, and the refusal of the trial court to give which, was held to be reversable error.

See also:

The "Pennsylvania," 19 Wall. 125;
Belden v. Chase, 150 U. S. 674;
The "Martello," 153 U. S. 64;
The "Britannia," 153 U. S. 130.

The second instruction requested by appellant (assignment of error number X, Tr. p. 129), is an alternative re-statement of the last paragraph of the preceding requested instruction.

The third requested instruction (assignment of error number XI, Tr. p. 130) is an instruction covering the enlargement upon section 513, Title 46 U.S.C.A., as promulgated by the Secretary of Commerce (Defendant's Exhibit 10), pursuant to authority vested in him by Title 46 U.S.C.A., section 518, requiring

the after white light prescribed by section 513, to be "placed at a higher elevation than the white light showing forward and so placed as to form a range with the forward light, and to be clear of house awnings and other obstructions," so as to be actually *visible* to a vessel approaching from the direction of appellant's vessel, and being part of the law applicable to the features of this case, appellant was entitled to have such instruction given to the jury.

Act of June 9, 1910, Chapter 268, paragraph 1, 2, 3, and 8;

36 Stats. 462;

Department Circular Number 236, 12th edition, issued by Secretary of Commerce, regulating motor boats under date of May first, 1928 (Defendant's Exhibit 10);

The "Breakwater," 155 U. S. 252;

The "Delaware," 161 U. S. 459;

The "Luckenbach," 50 Fed. 129;

The "Straits of Dover," 120 Fed. 900;

Belden v. Chase, 150 U. S. 674.

The court further erred in refusing to instruct the jury as requested in assignment of error number XII. (Tr. p. 131.) This instruction bears upon the question of any negligence upon the part of the appellant's vessel Olympic, and was as follows:

"You are instructed that all persons navigating vessels are entitled to assume and to place

reasonable reliance upon the assumption that persons navigating other vessels will obey the law as to lights required to be carried on such other vessels, and that the defendant was not guilty of negligence if those in charge of the navigation of defendant's vessel failed to anticipate or to guard against the absence of proper lights upon the plaintiff's vessel, or to act otherwise than a reasonable careful (115) or prudent person or persons would have acted under similar circumstances.

Belden v. Chase, 150 U. S. 674, 699, 37 L. Ed. 1218;

The Oregon v. Rocca, 59 U. S. 18, Howard 570, 15 L. Ed. 515."

The master of the Olympic had been running 14 or 15 minutes beyond West Point, and seeing no lights or anything indicating a vessel in his proximity ahead of him, we believe was entitled to assume that no vessel was ahead of him, violating the law by failing to carry the prescribed lights, and that he was entitled to rely upon this assumption to the extent of directing the lookout, who was almost directly below him, owing to the character of the weather and the taking of spray over the Olympic's bow, to fasten down curtains, which had commenced to blow loose, and that therefore the Olympic was not negligent in any respect.

The law clearly gives the master of the Olympic the right to assume that other vessels will be navigated

according to law and to place reasonable reliance upon that assumption. And if the court had so instructed the jury, the jury might properly have found that the Olympic was not guilty of any negligence, and so have returned a verdict for the appellant, notwithstanding all of the other errors in the record, and the failure of the court to give this instruction was therefore prejudicial error.

Belden v. Chase, supra;

The Oregon v. Rocca, 59 U. S. 18, Howard 570, 15 L. Ed. 515.

The statutory law required the appelee to carry life preservers, life belts, buoyant cushions or other devices sufficient to sustain him afloat, and so placed as to be readily accessable.

Title 46 U.S.C.A., section 515.

Appellee admitted that the only life saving equipment which he carried on his boat were some life preservers lashed down on the top of his pilot house where he could not get at them, and he therefore jumped overboard without this protection, and at the same time seeks damages against the appellant for personal injuries claimed to have been sustained due to swallowing water while immersed. His failure to carry the prescribed life saving equipment was contributory negligence as a matter of law on this phase

of the question, and the appellant was entitled to have the jury properly instructed thereon. The court refused to so instruct the jury and entirely ignored this element of the case, to the prejudice of appellant.

ARGUMENT ON SPECIFICATION NUMBER V

Notwithstanding the decision of this court upon the prior appeal, the trial court consistently refused, in instructing the jury, to determine the insufficiency of the light which appellee claimed to have carried, in lieu of the range light prescribed by law, and told the jury repeatedly that the only question before it was whether or not the appellee had the light which he claimed to have had in his pilot house, lit and in place a sufficient length of time to have permitted it to be seen. The court instructed the jury, as a matter of law, that the light which the appellee claims to have had *was* legally sufficient. His instructions on this point are covered by assignments of errors numbers XIV, XV, XVI, XVIII, XX, XXI, XXII, and XXIII. (Tr. p. 133-140.)

The vital error of these instructions is made apparent by the following condensed extracts which are quoted literally and which run through the assignments last above noted, viz.:

"As a matter of fact, the court agrees with the statement of counsel for the defense in his argument that if the plaintiff had that light in the doorway of his boat, lit long enough before the collision so that it could have been seen by a proper lookout on the Olympic, they would have avoided him, and the collision would have never occurred. *And if the plaintiff had it there, as he says that he did, and which the defendant denies, there is no reason why he should not recover in this action.* * * * That is all I can see in this case. * * * The burden is on him throughout to prove that he had that light there, lit there for the length of time that I have stated to you, and prove that it was a good and sufficient light to serve its purpose, and to prove the amount of his damages. * * * And, again, that is the attitude of counsel for the plaintiff, when he says there is only one question in this case, *and I agree with him, whether the aft light* on this vessel of the fisherman *was there.* * * * The plaintiff was not obliged to keep any lookout behind him, because *if he had his lights lit, he was entitled to presume that any vessel following him would take note of him and would comply with the law and not run him down.* * * * If that was his aft light, *and there is no reason why it could not have been seen,* even though it was not across the dividing line in the middle of the ship—between the bow and the stern—if that was his aft light, and it was the only aft light that he had, if it was not so placed that it would be seen all around the horizon, it could be seen from behind, but it could not be seen from either side, because it was within the frame two inches, and, of course, it could not be seen from the front. *But you must remember, too, that the law is a practical thing, and it does not require any useless thing.* If that light served the purpose

of an aft light to a following vessel, it was altogether immaterial whether it would show from the sides or show from ahead, so as far as that vessel is concerned, but provided it was sufficient to serve the purpose of an aft light for the following vessel, and could not at all have misled it or have contributed to the collision which happened. * * * So it comes right down to that question—the attitude taken by the plaintiff's counsel in his argument, *and the court takes it as a matter of law.* * * * You have two questions to decide in this case, outside of the damage, and you must decide them both in the affirmative before you can find for the plaintiff. First, it is proven by the greater weight of the evidence that Nelson's light in his cabin door *was where he testified that it was;* that it was of the kind that he testified it was, *and lit sufficiently long before the collision so that it could have been seen by the defendant's lookout,* had he been exercising his function properly and in time so that the collision might have been avoided. * * * Of course, if he did not have that light lit, and lit sufficiently long so that a watchful lookout on the defendant's vessel could have seen it in time to avoid him, why he has no right to any recovery here, because he was negligent. *In that case, he violated the law,* and I do not care whether it was five o'clock or five-twenty, or whether it was more or less dark, it is inevitable that the absence of his light, if it was absent, would have contributed something to the collision that followed. He is out of the case and out of court right there, *unless you find* by the greater weight of the evidence *that his light was there,* as he tells you, with that degree of sufficiency—a 6-volt light—*and lit long enough to have been seen and avoided by the defendant's vessel,* had it a watchful lookout at the time. * * * *If that light*

had been visible on the sides and ahead, *would it have better enabled the defendant's vessel aft to avoid him and to see him and avoid him? I do not think so,* and counsel's attitude for the plaintiff in his argument likewise was the same. *That is common sense. * * * So, if you answer those two questions in the affirmative,* proven by the greater weight of the evidence, favorable to the plaintiff, *then there is only one more question, and that is, how much was the damage? * * ** That is the case before you. It simmers down to this, Lady and Gentlemen of the Jury, that taking into consideration all of the evidence in the case, both for the plaintiff and the defendant, and the circumstances, *if you find* by the greater weight of the evidence *that the plaintiff, as he testified to you, a light in the door of his pilot house,* facing the rear, of 6-volt size, as he tells you, *and burning long enough before the collision so that a watchful lookout on defendant's vessel could have seen it,* and so could have avoided the collision, *he is entitled to recover."* (Italics ours.)

This is precisely the same series of instructions which the trial court gave in the first trial, and which this court on the former appeal held to be reversable error.

The late Judge Rudkin, in deciding the first appeal, held as follosw:

"The appellant requested an instruction in conformity with the foregoing rule in admiralty, but the request was refused. On the contrary, the court instructed the jury in effect, that, *if the appellee had a proper and sufficient light aft which could be seen at a sufficient distance by a*

vigilant lookout on the overtaking vessel, he was entitled to recover. In other words, *the court ignored the mandatory requirement of the statute in reference to the light aft, leaving the question of its sufficiency entirely to the jury, and imposed upon the appellant the burden not only of proving a breach of statutory duty on the part of the appellee, but also that such breach contributed to the disaster.* The requested instruction was in accordance with the admiralty rule, *and the instruction given ignored the statute and was contrary to the admiralty rule.* For these errors, the judgment must be reversed." (Italics ours.)

The error of the trial court in the case now on appeal is identical with that of the first case, with the single exception, that, whereas he formerly merely ignored the statutory law, in the instance case, he again completely ignores that law, and further ignores the law of this case as laid down by this court in the former appeal.

There might as well be no law as to lights, if the law is to be completely ignored, and the jury, without any evidence and only speculation and guess work to rely upon, is to be instructed that some other light inside of a vessel's structure is all that is required to be carried in order to entitle a vessel owner to recover, and to absolve him from contributory negligence.

Chief Justice Fuller, in the case of *Belden v. Chase, supra,* states the rule as follows:

"and it is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could have done so. The *Pennsylvania v. Troop,* 86 U. S., 19 Wall. 125, 136; 22 L. Ed. 148, 151; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.,* 136 U. S. 408, 422; 34 L. Ed. 398, 403. * * * Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. *The Oregon v. Rocca,* 59 U. S. 18 Howard 570; 15 L. Ed. 515."

The Martello, 153 U. S. 64;

The Britannia, 153 U. S. 130;

Lie, etc. v. San Francisco & Portland S. S. Co., 243 U. S. 291;

The Fanny M. Carvill, 2 Asp. M. C. (N. S.) 565;

The Duke of Buccleuch, 7 Asp. M. C. (N. S.) 68;

The Corinthian, 11 Asp. M. C. (N. S.) 264;

The Beryl, 9 Prob. Div. 137;

The Voorwartz—The Khedive, L. R. 5, App. Cas. 876.

In the *Straits of Dover,* 120 Fed. 900, 903-905, it was held:

"The obligation imposed to obey these rules is imperative, and those violating them, except under circumstances contemplated by the rules, must bear the consequences if damages ensue. * * * Citing *The Breakwater,* 155 U. S. 252; *The Dela-*

> *ware,* 161 U. S. 459; *The Luckenbach,* 50 Fed. 129, *The Chittagong,* App. Cas. 597. * * * * * Every consideration requires that these rules should be strictly observed by those for the government of whose conduct they were prescribed, and any departure therefrom should not be lightly overlooked or passed by. To do so would destroy the symmetry of the whole, and would place questions affecting the navigation of ships, now well settled and certain, in utter chaos and confusion."

These rules and the duty of strict compliance with them applies equally to vessels both large and small.

The Bellingham, 138 Fed. 619.

Under the law, the only light which should have been exhibited on the "Magna," visible to those upon the "Olympic," was a white light aft showing all around the horizon, and placed higher than the foremast light and free from all obstructions, and the admitted failure to carry this light cannot possibly be construed as other than one of the major causes, if not the sole cause of the collision.

The imperative nature of the requirements of the rules as to the maintenance of proper lights has been often stated by the courts.

The head note to the case of *The Royal Arch,* 22 Fed. 457, 458, is as follows:

"The Royal Arch was improperly navigated, in that she did not have her regulation side lights, and especially her green light, properly and brightly burning, and for that reason she was the sole culpable cause of the collision. It was her duty to keep her course, as she did, on seeing the red light of the Nellie Floyd. *It was the duty of the Nellie Ford to avoid the Royal Arch, but she was relieved from such duty by the failure of the Royal Arch to exhibit any light which those on the Nellie Floyd could see before the collision;* and their ignorance of the course of the Royal Arch, until it was too late for the Nellie Floyd to do anything to avoid the collision, was excusable, and was produced by such fault of the Royal Arch." (Italics ours.)

In the case of *The Mary Lord,* 26 Fed. 862, 866, it was held:

"The want of a red light was primarily the whole cause of the collision. The other vessel was deceived and misled by this failure to show that light. * * * The fault, then, being wholly on the part of the vessel libelled, there must be a decree accordingly."

In the case of *The Komuk,* 120 Fed. 841, at 842, it is held:

"A more serious charge against the Komuk and the Griggs is, that the latter did not display lights according to Rule 11 of the Pilot Rules. * * * The Griggs concededly did not comply with this rule but only exhibited one light, which was placed on her cabin. * * * In the absence of proper lights, it was incumbent upon the Komuk and the Griggs to show that the neglect

to comply with the rule did not contribute to the collision. This they have failed to do and they must bear a part of the loss."

In the case of *The Narragansett,* 11 Fed. 918, a case involving a schooner, which has the right of way over all power craft, when it obeys the rules, the court held:

"The libel alleges that the schooner was 'duly lighted'; that her green and red lights were 'brightly burning'; that she 'had all proper, sufficient, and lawful lights set and burning, as aforesaid.' The burden is on her to show this, and she has not done so."

In the case of *The Amboy,* 22 Fed. 555, the court observed:

"The purpose of lights is to be seen. If they do not fulfill that office to ordinary observation, the vessel must be held in fault; * * *

In the case of *The Mary Morgan,* 28 Fed. 333, the court held:

"The Pierrepont's side lights were up and burning, but they were in bad condition, the lanterns being incrusted with smoke. * * *"

"Upon these facts I am of opinion that the Pierrepont was in fault in not having her lights in proper condition * * *."

W. H. LaBoyteaux, in his *"The Rules of the Road at Sea,"* 1920 Ed., observes, p. 13:

"Special attention should be given to insure that all lights are placed in their proper locations *in strict compliance with the rules,* and that they are not obscured by deck houses, deck cargo, sails, smoke from the galley, or other obstructions or causes." (Italics ours.)

Again in the case of the *Vesper,* 9 Fed. 569, involving a schooner having the right of way over the power vessel, which ran her down, if she complied with the rules as to lights, it was held:

"But had the red light been continuously hidden by the jib, as claimed, that would not improve the libellant's case. The Vesper can only be charged for some fault of her own. *Her duty to keep out of the way of the schooner was conditioned upon her having notice of the situation and course of the John Jay by proper and visible lights.* The rules of navigation require that these lights shall be 'so constructed as to show a uniform and unbroken light over an arc of the horizon of 10 points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam,' on either side, * * * If either light is so obscured that a steamer is misled and deceived as to the course of the sailing vessel, and a collision ensues in consequence, it is manifestly no fault of the steamer; and if the sailing vessel suffer damage, it must be set down to her own fault or misfortune, as the case may be." (Italics ours.)

In the case of *The Johanne Auguste,* 21 Fed. 134, the court held:

"It is impossible, and it is unnecessary, to determine in what particular way, or from what cause, the red light of the Fontenaye was obscured. I am satisfied it was obscured. Had it been seen when it ought to have been seen, I cannot doubt that the Johanne Auguste, by porting earlier that she did, might have escaped the collision, and would have done so. The Fontenaye must be held responsible for any obscuration of her light, especially when placed in the extreme after-part of the ship, where there is such increased danger of obstruction * * *."

In the case of *The Virginian,* 235 Fed. 98, it was held:

"* * * * * she was at fault, in that she was not equipped with proper side lights, that the lights were not ordinarily bright, and were not visible at as great a distance as they should have been, and that they were so placed or so obstructed by the deck load or otherwise that they were not discernible from all points ahead."

Again in the case of *Clendinin v. The Steamship Alhambra,* 4 Fed. 86, which involved a schooner and a power vessel, the schooner, ordinarily the privileged vessel, was held at fault for improper lights. The court said:

"This testimony from the respective vessels in regard to the course of the schooner, and the lights she displayed, apparently so contradicting, can, I think, be reconciled by reference to the fact, stated by the master of the schooner in the most positive manner, that the side lights of the schooner were placed so that when he stood at the

stem he could see both the red and green light at the same time without moving his head. * * * But this explanation convicts the schooner of fault for carrying lights so arranged as to mislead an approaching vessel in regard to the course she was pursuing."

LaBoyteaux, in *The Rules of the Road at Sea, supra,* p. 15, observes:

"Upon the master rests the responsibility of seeing that the proper lights are carried, correctly placed and kept burning brightly. The fact that improper lights are carried under the instructions of a compulsory pilot will not relieve the master from responsibility or the vessel from liability therefor.

"It is significant that not only do the rules begin with prescribing lights and signals to be carried, but they end with the caution in Article 29:

" 'Nothing in these rules shall exonerate any vessel * * * from the consequences of any neglet to carry lights or signals * * *.'

"The most rigid adherence to these rules in their minutest detail is required by the courts, and any deviation will inevitably involve the offending vessel in fault for a resulting collision.

"As was said by the Circuit Court in *The Titan,* 23 Fed. 413, 416:

" 'The rule requiring lights may as well be disregarded altogether as to be partially complied with, and in a way which fails to be of any real service in indicating to another vessel the position and course of the one carrying them'." (Italics ours.)

The real matter of importance is that it was the failure of the Magna to carry the prescribed range light, which brought the vessels into a position of extremis, resulting in the collision.

In the case of *The Genevieve,* 96 Fed. 859, it was held:

> "The cause for such collisions as this must generally be sought for at a time prior to the few moments immediately preceding the impact. After the vessels are in close proximity either or both, in the stress of sudden danger, may adopt an unwise and imprudent course. The question is, who is to blame for bringing the vessels into a position where cool calculation is impossible."

In the case of *The Transfer No.* 10, 137 Fed. 666, it was held:

> "And the question in this case, as in all collision cases, is not what the colliding vessels do when they get down close to each other, but what was the maneuver which they adopted and what was the maneuver which it was their duty to adopt, under the rules of the road when they were still far enough apart to adopt those maneuvers deliberately and safely."

The Frank P. Lee, 30 Fed. 277:

The court said, at page 279:

> "She was, however, guilty of fault in failing to display a torch or white light, in coming up to the wind, in the respondent's front, and virtually stopping in her track; as required by statute.

It is impossible to say that such a light would not have tended to avoid the collision. The Assessor thinks it would and his conclusion is reasonable. It is sufficient, however, that it might possibly have done so. *The Pennsylvania,* 12 Fed. Rep. 916, *The Excelsior,* Id. 203; *The Hercules,* 17 Fed. Rep. 606."

The Roman, 14 Fed. 61.

The court said, at page 63:

"If the schooner had performed its duty by exhibiting the prescribed light, presumably it would have escaped injury. The burden is upon it to show that the cause was the misconduct or negligence of somebody else; *and it must be borne upon no uncertain proof or doubtful conclusions.* We cannot relieve it of the full consequences of its own deriliction by transferring them partly to another, whose culpability is problematical."

The Florence P. Hall, 14 Fed. 408.

The court said, at page 416:

"Where as in this case, the defense of inevitable accident is raised, and the pleadings make a direct issue upon the question whether the weather was such that the lights of the libellant's vessel could be seen in time to enable the claimant's vessel, by due nautical skill, to keep out of the way, the burden of proof is upon the libellants to show, not only that the lights were set and burning, but also that the weather was such that they *could be seen* at a sufficient distance to avoid the collision. * * * In case of a collision on a dark night, these necessary conditions include proof, not merely that the libellant's vessel had proper lights set and burning, but also that such lights

were visible at a distance sufficient to enable the other vessel, by due nautical skill, to keep out of the way. Otherwise no negligence can be inferred."

The Act of June 9, 1910, makes it definitely unlawful for any substitute or makeshift light in the cabin or wheel-house to be carried in lieu of the prescribed light. Sec. 3 of that Act provides:

> "Sec. 3: Every motor boat in all weathers from sunset to sunrise shall carry the following lights, *and during such time no other lights which may be mistaken for those prescribed shall be exhibited.*" (Italics ours.)

Under the admitted facts of this case, therefore, and the settled and unvarying law applicable to such facts, and the admitted failure of the plaintiff to carry the prescribed or any range light, the plaintiff must be charged with at least contributory negligence, and the instructions to which exceptions were taken are fundamentally erroneous.

It was stated by Chief Justice Fuller in *Belden v. Chase, supra,* as follows:

> "The rules laid down * * * as thus authorized have the force of statutory enactment, and their construction * * * as well as that of the rules under section 4233, is for the court, whose duty it is to apply them as a matter of law upon the facts of a given case. They are not mere prudential regulations, but binding enactments, obligatory

from the time that the necessity for precaution begins, and continuing so long as the means and opportunity to avoid the danger remains. *Peters v. The Dexter,* 90 U. S. 23 Wallace 29. Obviously they must be rigorously enforced in order to attain the object for which they were framed which could not be secured if the masters of vessels were permitted to indulge their discretion in respect of obeying or departing from them."

ARGUMENT ON SPECIFICATION NUMBER VI

There remains only one further error to be considered. The testimony in this case was by the appellee that he had a light inside the door of his pilot house. No witness produced by the appellant was able to say that this was not so. He may have had a dozen lights inside his vessel, which would be wholly immaterial to this case.

The witness for the appellant testified that no light was visible from the Olympic. No witness contradicted this testimony. There, therefore, was present no situation where one witness testified that he saw something and another witness testified that he did not see the same thing, which is necessary to bring into play the rule of positive and negative testimony. The court therefore erred in giving any instruction with reference to positive and negative testimony, and the instruction which he did give upon the subject is er-

roneous, even upon that subjejct. He instructed the jury as follows:

> "Now, the law says that where two persons testify to a situation at the same time, the one who testifies positively that it was thus and so—'I saw it'—is entitled to more weight than one who says, 'No, it was not that way.' 'I didn't see it.'
>
> "That is the point that counsel wants to make, and it is for you to say whether it applies in this case. The plaintiff says, 'I had the light there,' and the captain says, 'He did not have the light there, because I did not see it.' Of course, that involves whether he saw it or he did not see it because it was not there."

The instruction is patently bad upon its face and in addition to every other objectionable feature the court leaves the applicability of the instruction to the jury, whereas the law requires him to decide and to instruct the jury accordingly.

WHEREFORE, it is respectfully submitted that appelant, by the foregoing manifest errors of the trial court, has been deprived of a fair and proper trial, and the judgment of the lower court should be reversed.

Respectfully submitted,

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